IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No. 4211 of 2006 (O&M)
Date of Decision: 01.8.2007

Jai Chand ...Appellant

Versus

Bag Chand ....Respondent

Coram: Hon'ble Mr. Justice Hemant Gupta.

Present: Shri Atul Lakhanpal, Advocate, for the appellant.

Shri Arvind Kashyap, Advocate, for the respondent

HEMANT GUPTA, J.

The defendant is in second appeal aggrieved against the judgment and decree passed by the learned first Appellate Court, whereby the suit for specific performance of agreement of sale dated 12.7.2000, in respect of the land measuring 3 marlas, was decreed.

The plaintiff filed the suit for specific performance of the aforesaid agreement on 15.6.2001, on the ground that out of the total sale consideration of Rs.42,000/-, a sum of Rs.38,900/- was paid as earnest money. The sale deed was to be registered on 11.1.2001 and that the plaintiff was ready and willing to perform his part of the contract, but the defendant did not get the sale deed executed. The plaintiff was present in the Tehsil Office, but the defendant did not appear. After serving a notice to the defendant calling upon him to get the sale deed registered on 1.6.2001,

the plaintiff filed the present suit for specific performance.

The learned trial Court, returned a finding that the agreement of sale is proved to be executed as well as the fact that the earnest money of Rs.38,900/- was paid by the plaintiff. However, the relief of specific performance of the agreement was declined for the reason that the possession was not delivered to the plaintiff by the defendant, who along with his family members is residing in the house in question. It was held that the ends of justice would be met if the amount paid by the plaintiff as earnest money is refunded to the plaintiff with interest. The appeal against the said judgment and decree by the plaintiff, was accepted holding that failure to deliver possession is of no consequence as the possession can be taken by the plaintiff in execution of the decree and consequently the learned first Appellate Court, granted a decree for specific performance of the agreement.

When the appeal came up for hearing before this Court on 9.2.2007, the defendant raised an argument regarding validity of the agreement itself. The appeal was admitted on the following substantial question of law, while granting stay of the execution of the decree:-

> "Whether the findings recorded by the Courts below in respect of execution of agreement of sale dated 12.7.2000 are sustainable in law?"

Subsequently, the plaintiff-respondent moved an application for vacation of stay pointing out that it is not open to the appellant to dispute the execution of the agreement in second appeal as the trial Court itself has recorded a finding that the agreement stands proved. The defendant has not filed any appeal against the said judgment and decree. Therefore, the defendant is precluded from disputing the finding

regarding due execution of the agreement. Therefore, the only argument available to the appellant is whether the decree for specific performance could be passed by the learned first Appellate Court. In view of the fact that the dispute between the parties lies in a narrow compass, both the sides have addressed arguments on the main appeal itself while addressing arguments on such application.

Having heard learned counsel for the parties, I am of the opinion that the judgment and decree passed by the learned first Appellate Court, cannot be said to be suffering from any patent illegality or irregularity raising any substantial question of law in the present second appeal.

The learned trial Court has decreed the suit when the execution of the agreement and payment of earnest money of Rs.38,900/- was found to be proved. The only reasoning given by the learned trial Court to decline the relief of specific performance of the agreement is that the possession was not delivered and the defendant is residing in the house in dispute.

Learned counsel for the appellant has relied upon **Skinner, R.H. v. Veronica Skinner, AIR 1930 Lahore 1004** and **Devendra Basappa Doddannavar v. Smt. Sonubai Tuljansa Kosandal and others, AIR 1971 Mysore 217,** to contend that the learned trial Court, having exercised the discretion in not granting a decree for specific performance, the learned first Appellate Court, could not have interfered with the said finding.

On the other hand, the learned counsel for the respondent has placed reliance on **Devalsab (dead) by Lrs v. Ibrahimsab**

F. Karajagi and another, AIR 2005 SC 1940; Santa Singh v. Binder Singh and others, 2007(1) PLR 589 and **Matadin Agarwal and etc. v. Syed Abdul Razack and others, AIR 1997 Andhra Pradesh 103,** to contend that the discretion exercised by the learned first Appellate Court, in granting the decree for specific performance is perfectly justified.

In respect of sale of immovable property, the ordinary rule is that specific performance of the agreement should be granted. It ought to be denied only when equitable considerations point to its refusal and the circumstances show that damages would constitute an adequate relief. Reference may be made to **M.L. Devender Singh and others v. Syed Khaja, AIR 1973 SC 2457** and **Prakash Chandra v. Angadlal and others, AIR 1979 SC 1241.** In **M.L. Devender Singh's case (supra)**, it has been held that in case of a sale of the property, specific performance of an agreement is to be granted even if alternate relief of damages is claimed. It was so held as under:-

> "19. A reference to Section 22 of the old Act, (the corresponding provision is Section 20 of the Act of 1963), would show that the jurisdiction or the Court to decree specific relief is discretionary and must be exercised on sound and reasonable grounds guided by judicial principles and capable of correction by a Court of appeal. This jurisdiction cannot be curtailed or taken away by merely fixing a sum even as liquidated damages. We think that this is made perfectly clear by the provisions of Section 20 of the old Act (corresponding to Section 23 of the Act of 1963) so that the Court has to

> determine, on the facts and circumstances of each case before it, whether specific performance of a contract to convey a property ought to be granted.
>
> 20. The fact that the parties themselves have provided a sum to be paid by the party breaking the contract does not, by itself, remove the strong presumption contemplated by the use of the words "unless and until the contrary is proved." The sufficiency or insufficiency of any evidence to remove such a presumption is a matter of evidence. The fact that the parties themselves specified a sum of money to be paid in the event of its breach is, no doubt, a piece of evidence to be considered in deciding whether the presumption has been repelled or not. But in our opinion, it is nothing more than a piece of evidence. It is not conclusive or decisive."

In the present case, the trial Court, declined the relief of specific performance primarily on the ground that the defendant is residing in the house in question along with his family members and the ends of justice would be met if the amount paid by the plaintiff as earnest money, is refunded to him. Once, the finding has been returned by the learned trial Court that the execution of the agreement is proved, then the fact that the possession was not delivered, is wholly inconsequential as such fact does not affect the execution of the agreement or the payment of the earnest money or the fact that the plaintiff was ready and willing to perform his part of the contract. The plaintiff has filed a suit for specific performance of the agreement, therefore, in the event of decree being passed, the possession

can very well be delivered to the plaintiff. Similarly, the fact that the defendant was residing in the house in question, is immaterial as the defendant has executed the agreement to sell knowing well that he is residing in the house. There is no hardship pleaded by the defendant in the written statement nor proved on record in terms of Section 20 of the Specific Relief Act, 1963 (for short `the Act'). In fact, the appellant has denied the execution of the agreement.

In terms of Section 20(2)(b) of the Act, the Court may exercise discretion not to decree specific performance in the cases where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non performance would involve no such hardship on the plaintiff. The Explanation (1) contemplates that mere inadequacy of consideration, or the fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute a hardship. Still further, Explanation (2) contemplates that the hardship on the defendant within the meaning of clause (b) of Section 20(2) of the Act, would be determined with reference to the circumstances existing at the time of the contract. Therefore, the fact that the defendant and his family members are residing in the house, is not a hardship, which may permit the defendant to avoid the specific performance of the contract, in terms of Section 20 of the Act.

Therefore, the discretion exercised by the learned first Appellate Court, in granting the specific performance of the agreement, cannot be said to be in contravention of the established principle of law.

Consequently, I do not find any patent illegality or irregularity in the findings recorded by the learned first Appellate Court,

which may give rise to any substantial question of law in the present appeal.

Hence, the present appeal is dismissed.

August 01, 2007 (HEMANT GUPTA)
ds JUDGE